No. 84-1044

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984

PACIFIC GAS AND ELECTRIC COMPANY,
Appellant,

vs.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA,
Appellee.

On Appeal From the
Supreme Court of California

BRIEF OF WISCONSIN STATE TELEPHONE ASSOCIATION AND WISCONSIN BELL, INC. AS *AMICI CURIAE*

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Wisconsin State Telephone Association ("WSTA") and Wisconsin Bell, Inc. ("Wisconsin Bell"), with the consent of all parties,[1] file this brief as *amici curiae* urging that the Court reverse the judgment of the Supreme Court of the State of California. This case is of interest to WSTA and Wisconsin Bell because concurrent with the filing of this brief, they have commenced an action in the United States District Court for the Eastern District of Wisconsin seeking declaratory and injunctive relief from the provisions of Wis. Stat. § 199.10 (1983-84).(*See* Appendix.) Section 199.10 is the functional equivalent of the Order entered in Decision No.

[1]The parties' written consents for WSTA and Wisconsin Bell to file this brief as *amici curiae* have been filed with the Clerk of this Court.

83-12-047 (Cal. PUC Dec. 20, 1983) (hereinafter "Decision No. 83-12-047") and affirmed by the California Supreme Court. Some issues presented in WSTA's and Wisconsin Bell's case are similar to those presented in the above-encaptioned appeal from the Order of the California Public Utility Commission (hereinafter "Cal. PUC").

INTEREST OF THE *AMICI CURIAE*

WSTA is a trade association of telephone companies who provide telephone service within the State of Wisconsin. WSTA's members are subject to regulation by the Wisconsin Public Service Commission (hereinafter "Wis. PSC"). Wis. Stat. § 196.02(1) (1983-84). Wisconsin Bell is a member of WSTA and provides, among other things, local telephone service within its authorized service areas in the State of Wisconsin.

Wis. Stat. ch. 199, which establishes a non-profit public body corporation and politic to be known as the "Citizens Utility Board" (hereinafter "CUB"), became effective November 29, 1979.[2] Section 199.10, like Cal. PUC's Decision No. 83-12-047, provides a procedure pursuant to which, not more than two times annually, CUB may insert enclosures informing utility customers of the nature and activities of the corporation and soliciting contributions. Wis. Stat. § 199.10(2)(b). Pursuant to this provision, CUB has submitted printed statements which Wisconsin Bell and other WSTA members have been required to insert in their billing envelopes. CUB's inserts routinely accuse Wisconsin Bell and other Wisconsin utilities of charging excessive rates. (WSTA App. 7a-9a, 11a-13a, 17a.) CUB has even gone so far as to attack the $1.00 access charge mandated by the Federal Communications Commission through the medium of bills being sent to natural *gas* customers. (WSTA App. 22a.) WSTA's members some cases have responded by denying these charges. (WSTA App. 19a, 20a, 26a, 28a.) However, the Wisconsin Public

[2]The Citizens Utility Board Act, ch. 72, 1979 Wis. Laws 457.

Service Commission has discouraged such responses.[3]

CUB's access to utility billing envelopes under § 199.10 imposes substantial economic burdens on Wisconsin Bell and other WSTA members.[4] For example, Wisconsin Bell's April and March, 1985 residential service bills would have been under one ounce in all but 3% of the cases, but for a CUB enclosure which caused 25% of the bills to exceed one ounce. (WSTA App. 4a.) Thus, Wisconsin Bell had no opportunity to speak in response to CUB's insert without incurring the full cost of mailing. Furthermore, Wisconsin Bell incurred actual costs exceeding $45,000 by reason of CUB's insert, as to which the amount of partial reimbursement by CUB under § 199.10(3) is being litigated.[5]

[3]In a letter dated September 14, 1984 to WSTA and its members, including Wisconsin Bell, the Chairman of the Wis. PSC wrote:

> It has come to my attention that there is an increasing trend of enclosing reply brochures with the CUB enclosures. I completely understand your right to freely express your opinions on any subject including CUB. My concern however is two-fold. First, I would strongly urge you not to engage in a battle of innuendo. Customers deserve arguments on the merits, not further sideshows that produce only confusion. Second, customers will undoubtedly be irritated by receiving even more enclosures with their bill. Therefore, while I assume that the purpose of your reply is not intended to undercut the legislative decision to allow CUB to solicit money from your customers, I am afraid that reply enclosures may produce such an unintended result.
>
> I would hope that you reconsider any decision which you have made to enclose reply enclosures for the two reasons I have mentioned. I doubt that any benefits from such reply enclosures will exceed the detriments which they may cause. I would be happy to discuss my concerns further with you if you wish.

[4]According to Wis. Stat. § 199.10(3) (1983-84):

> If the weight of a public utility's periodic customer billing, when combined with the corporation's statements or other enclosures under sub. (1), exceeds one ounce avoir, the corporation shall reimburse the public utility for the proportion of the total postage cost of the billing which is equal to the corporation's proportion of the total weight of the billing.

The effect of this provision for reimbursement on a proportional basis is that CUB is required to pay only a fraction of the actual incremental mailing costs incurred by Wisconsin Bell by virtue of CUB's inserts. *See* WSTA App. 4a. Under Cal. PUC's Decision No. 83-12-047, Wisconsin Bell would have *no* right of reimbursement.

Section 199.10 is highly content-restrictive. It limits CUB speech to specific topics;[6] it requires PSC approval of content;[7] and, it requires CUB to negotiate with utilities with respect to speech content.[8]

WSTA's members, including Wisconsin Bell, therefore have had considerable firsthand experience with the actual operation of including a professional intervenor's inserts in utility bills. WSTA's and Wisconsin Bell's intent in filing this brief *amici curiae* is to draw on that experience to demonstrate the destructive effect on First Amendment rights generally and the chilling effect on a utility's right of free speech in particular which necessarily results from governmentally compelled access to utility bill

[5]Citizens Utility Board v. Wisconsin Bell, Inc., No. 84-CV-4693 (Dane Co., Wis. filed Aug. 13, 1984).

[6]Section 199.10(1)(d) provides:

> An enclosure or statement furnished by the corporation under this section shall be limited to informing the reader of the purpose, nature and activities of the corporation and informing the reader that the utility consumer billed and others in his or her household may contribute money to the corporation directly. The enclosure or statement shall have the character of a circular and may not have the character of a bill, statement of account or personal correspondence.

[7]The relevant provisions of § 199.10 are as follows:

> (1)(e) The corporation may not furnish any enclosure or statement to a public utility under this section unless the enclosure or statement has been approved by the public service commission under sub. (2m).
>
> * * *
>
> (2m) Prior to furnishing a statement or enclosure to a utility under sub. (1), the corporation shall submit the statement or enclosure to the public service commission. The public service commission shall approve the statement or enclosure if it determines that the statement or enclosure is not false or misleading and that the statement or enclosure satisfies the requirements of this section.

[8]"A dispute arising from the operation of this section shall be resolved by negotiations between [CUB] and the public utility if possible . . . ." Wis. Stat. § 199.10(4).

envelopes by professional intervenors.[9]

SUMMARY OF ARGUMENT

Any governmental action which compels one person to publish the speech of another destroys *free* speech by both the intervenor and the publisher by:

1. Inevitably involving the government in content regulation of speech; and
2. Penalizing the publisher's speech.

ARGUMENT

I. GRANTING PROFESSIONAL INTERVENORS ACCESS TO UTILITY ENVELOPES IS NECESSARILY BASED ON CONTENT.

A. The Cal. PUC's Decision to Require Inclusion of TURN Inserts Was In Fact Content Based.

One fundamental principle clearly enunciated by this Court is that speech may not be prohibited " 'merely because public officials disapprove the speaker's views.' " *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 536 (1980) (quoting *Niemotko v. Maryland*, 340 U.S. 268, 282 (1952) (Frankfurter, J., concurring in result)).[10] Therefore, governmental action which is to any degree based on the content of speech must be strictly scrutinized to assure that the regulation does not operate to suppress speech with which some governmental official disagrees.

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[9]Testimony by representatives of the Wis. PSC and Wisconsin CUB was relied upon in both the California PUC (A-98) and the New York (A-116) proceedings. However, no Wisconsin utility testified in either proceeding.

[10]*See also* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983); Dallas County Hosp. Dist. v. Dallas Ass'n of Community Org. for Reform Now, 459 U.S. 1052 (1982); Metromedia, Inc., v. City of San Diego, 453 U.S. 490 (1981); United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114 (1981).

Content regulation is particularly dangerous in this context because it allows utility regulators to influence, directly or indirectly, utility speech. When utilities disagree with regulatory decisions, they must be free to criticize them without concern that their right to speech will be withdrawn, wholly or partially. If the First Amendment guarantees anything, it is the right to criticize the government, including utility regulators, and to promote ideas with which governmental officials disagree.

While the Cal. PUC has not been as candid as was the New York Public Service Commission (hereinafter "N.Y. PSC") in *Consolidated Edison*,[11] the record demonstrates that Cal. PUC's action was no more "content neutral" than was the N.Y. PSC's. On the contrary, the record clearly shows that the Cal. PUC perceived that PG&E was promulgating viewpoints through *Progress* which the Cal. PUC viewed as "inefficient", that TURN would publish views seen as "beneficial", and that others whose views were not as "beneficial" should be denied access.

1. Decision No. 83-12-047 is the Cal. PUC's response to an entirely content-based attack on *Progress*, originally mounted by TURN in Decision 93887. (A-65.)

2. In Decision No. 93887 (Cal. PUC Dec. 30, 1981), the Cal. PUC criticized PG&E for inserting *Progress* in place of "more efficient" uses. (A-68.)

3. Cal. PUC characterized PG&E's use of the envelope as "unjust enrichment" (A-3), a characterization which would not have been made if PG&E were putting the space to its most "efficient" use in the eyes of the Cal. PUC.

4. The Cal. PUC assumed that "ratepayers will benefit more from exposure to a variety of views than they will from only that of PG&E." (A-17.)

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[11]The N.Y. PSC prohibited utilities from using bill inserts "to discuss political matters, including the desirability of future development of nuclear power." *Consolidated Edison*, 447 U.S. at 532.

5. TURN was granted access to PG&E's envelope because its proposal was seen as sufficiently beneficial to ratepayers. (A-16.)

6. The Cal. PUC refused to allow the Committee of More than One Million California Taxpayers to Save Prop. 13 access to the PG&E billing envelope, on the ground that the content of the Committee's proposed insert did not "sufficiently benefit ratepayers." (A-161.)[12]

B. Further Content Regulation Is Occurring and Will Be Required.

Notwithstanding the Cal. PUC's attempt to preserve the impression that there will be no state intervention in the content of PG&E's and TURN's inserts in PG&E's bills (A-32), further content regulation is inevitable. Indeed, the Cal. PUC's claim of nonintervention is promptly retracted by a regulation that details speech which TURN is required to

[12] In Decision No. 84-10-062, the Cal. PUC stated:

> In determining that the extra space could be used to benefit ratepayers, we did not intend to create a public forum for any group that could claim ratepayers as members. Access to the billing envelopes has so far been granted only to groups organized specifically to represent ratepayers in our proceedings . . . . [W]e do not believe that the Committee's proposal . . . sufficiently benefits ratepayers as ratepayers to justify [access].

(A-160 to 161.) This is the specific "issue" regulation of speech that was held unconstitutional in First Nat'l Bank v. Bellotte, 435 U.S. 765 (1978).

publish as a condition of its access to PG&E's envelopes.[13] The N.Y. PSC has put its finger directly on the problem:

> [T]he Commission is providing [CUB] with the special property of access and, as such, we recognize our responsibility to consider allegations that clearly misleading information is being included in the bill inserts. [A-132.]

The Cal. PUC will inevitably be driven to the same position. The "free space" in utility envelopes is a very limited resource. Once a governmental agency has taken responsibility for maximizing the most "efficient" use of that space, the same logic requires that agency to assure that, in its eyes at least, the use of that limited resource will best benefit the ratepayers.

Thus, content regulation occurs both through the process of selecting the intervenor to be awarded access and later in monitoring the intervenor's speech. Moreover, as earlier demonstrated, the regulator's desire to maintain a balance between the utility's and intervenor's messages leads to suppression of utility speech just as predicted in Lange, *The Role of the Access Doctrine in the Regulation of the Mass Media: A Critical Review and Assessment*, 52 N.C.L. Rev. 1, 77-80 (1973). Lange foresaw that government mandated access for the purpose of achieving "balance" will inevitably lead to "a new consolidation of American orthodoxy in which balanced mainstream thinking will come to dominate the press even more so than at present while serious dissent will be, in relative terms, even more sure-

[13] TURN shall prepare and distribute an annual report to all PG&E ratepayers who contribute to TURN through the bill insert process. The report shall describe TURN's efforts on behalf of residential ratepayers in the past year and include a statement audited by a certified public accountant stating the amount received by TURN from ratepayers through the insert process and how the funds were spent to advance the interests of ratepayers.

(A-33). According to the N.Y. PSC's May 14, 1984 Statement of Policy Governing the Access of Intervenor Organizations to the Extra Space in the Utilities' Billing Envelopes, "the CPUC has stated that it would suspend the organization's access to the bill envelope if a serious problem developed." (A-131.)

Wisconsin and Illinois also tightly regulate the content of inserts, requiring *approval* of inserts by the regulatory authority. Wis. Stat. §§ 199.10(1)(e), (2m) (1983-84); Ill. Rev. Stat. ch. 111 2/3, § 909(1)(d) (Supp. 1984).

ly suppressed." *Id.* at 77. In the specific context, if "conservation" or "non-nuclear plants" are the current Cal. PUC policy, there will be strong pressures on both PG&E and TURN to conform to that policy lest their speech be termed "inefficient" and therefore banned or further restricted, as has already happened to PG&E.

C. Content Based Regulation of Access Destroys *Free* Speech.

The First Amendment protects *freedom* of speech; not just speech, but "uninhibited, robust and wide-open" debate. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). One truly *free* speaker, no matter how biased, is worth more in the eyes of the First Amendment than ten regulated speakers. Multiple points of view are desirable to be sure, but the appearance of multiple speakers, if each speaks only at the sufferance of the government, is an illusion, a pretense of free speech and not the reality thereof. In truth, the Cal. PUC decision, while apparently increasing speech, has actually reduced the number of *free* speakers by at least one (PG&E has clearly lost its freedom), and possibly by two (if TURN conforms its speech to its perception of Cal. PUC orthodoxy).[14]

As noted in 2 Z. Chaffee, *Government & Mass Communications* 701 (1947): "Subsidies are like spectacles. Once you get to depend on them, you cannot live without them." Once TURN or PG&E come to rely upon the Cal. PUC for free access to PG&E's customers, they have *both* lost their *freedom* of speech. Only speech whose content and cost are *totally* independent of the government is truly *free*.

Ideally from the standpoint of the First Amendment, PG&E and TURN would be equally financially capable of expressing their views to PG&E's customers. That ideal world does not exist. The only party which, because of its physical control of the billing envelope, can speak through the PG&E envelope without governmental intervention is PG&E. It is better to have

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[14]Almost as damaging to free speech as the direct governmental regulation discussed above is the supposed cure of informal content dispute resolution between the professional intervenors and the utilities required by Wis. Stat § 199.10(4). *See* note 8 *supra*. The idea of "negotiating" speech with an opponent is absolute anathema to any true believer in free speech.

"unbalanced" but *free* speech, than to have "balanced" speech which can be achieved only at the cost of governmental control of a speech medium.

Use of the "extra space" in utility billing envelopes may be allocated through less intrusive, *i.e.* more content neutral, means such as granting billing envelope access to the high bidder(s). While such alternatives are not desirable either, the means selected by the Cal. PUC — direct governmental choice of a speaker, of the quantity of speech, and of the content of speech — is clearly the *worst* alternative. Even a total ban on speech through utility envelopes, which this Court has already disapproved, would be less of an interference with *free* speech.

II. GOVERNMENTALLY MANDATED ACCESS TO UTILITY ENVELOPES FOR PROFESSIONAL INTERVENORS PENALIZES UTILITY SPEECH.

There are two important lessons for this case in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). The first is that governmentally *coerced* access inevitably involves the government in deciding what shall be published and that governmental compulsion "to publish that which '"reason" tells [publishers] should not be published' is unconstitutional." 418 U.S. at 256. The second lesson, which is most directly applicable here, is that authorizing access on the basis of prior publications exacts a *penalty* on the basis of the content of a publication.[15]

There are two aspects to such a penalty. "The first phase of the penalty resulting from the compelled printing of a reply is exacted in terms of the cost in printing and composing time and materials *and in taking up*

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[15]This observation, while made with respect to newspapers, applies with equal force to utilities' printed messages.

> Freedom of the press is a "fundamental personal right" which "is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets."

Branzburg v. Hayes, 408 U.S. 665, 704 (1972) (quoting Lovell v. Griffin, 303 U.S. 444, 450, 452 (1938)).

space that could be devoted to other material the [publisher] may have preferred to print.'' Tornillo, 418 U.S. at 256 (emphasis added). The second aspect of the penalty is that, confronted with the first aspect, ''editors might well conclude that the safe course is to avoid controversy.'' *Id.* at 257.

> Therefore, under the operation of the [candidates' right-of-reply] statute, political and electoral coverage would be blunted or reduced. *Government-enforced right of access inescapably ''dampens the vigor and limits the variety of public debate.''*

Id. (quoting *New York Times v. Sullivan,* 376 U.S. 254, 279 (1964)) (emphasis added).

Allowing professional intervenors to have access to utility bills penalizes utility speech in the economic sense by shifting the potential benefit of the use of ''extra space'' in billing envelopes from the utility to the professional intervenors[16] and, in some instances, forcing the utility to subsidize the intervenor.[17] One simply cannot deny that such a shift has occurred through the agency of governmental intervention.

This Court has never allowed the government to shift costs to either burden or benefit speech because of the danger of censorship inherent in making a speaker's costs dependent on governmental favor. In *Grosjean v. American Press Co.,* 297 U.S. 233 (1936), this Court confronted an apparently neutral tax on newspaper publication which the Court recognized was ''bad because, in the light of its history and of its present setting,

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[16]In a recent *gas* utility bill, CUB attacked the $1.00 per month access charge mandated by the Federal Communications Commission and asked for money to lobby Congress to fight the access charge. (WSTA App. 22a.) The net effect of this tactic is that CUB can, without charge, attack telephone utilities through a gas company bill, but the telephone utilities, because of their heavier bills, must incur additional mailing costs if they are to respond. (WSTA App. 4a.) Ironically, then, in this case the process has come full circle so that the supposedly advantaged and disadvantaged parties have, through governmental intervention, exhanged places.

As this shows, equalized speech is exceedingly difficult to achieve. Moreover, the First Amendment mandates *free* speech, not equally effective speech. Buckley v. Valeo, 424 U.S. 1, 49, 54, 56 (1976).

[17]*See* note 4 *supra.*

it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information . . . .'' 297 U.S. at 250. A tax imposed only on the press was ruled unconstitutional in *Minneapolis Star & Tribune Co. v. Commissioner of Revenue,* 460 U.S. 575 (1983), because ''even without actually imposing an extra burden on the press, the government might be able to achieve censorial effects, for ''[t]he threat of sanctions may deter [the] exercise [of First Amendment rights] almost as potently as the actual application of sanctions.'' 460 U.S. at 588.

The penalty rationale was the point upon which *Tornillo* was distinguished in *PruneYard Shopping Center v. Robins,* 447 U.S. 74, 84 (1980), and which, in turn, is one of the points which distinguishes *PruneYard* from this case. It was clear in *PruneYard* that the speech allowed in the shopping center's public areas was totally independent of, and could have had no possible bearing upon, any exercise of free speech by the merchants or the mall owner. Therefore, the allowance of such speech had *no* effect on the speech of others. Here, it is equally clear that, as in *Tornillo,* TURN was granted access to PG&E's billing envelope precisely because PG&E had exercised its free speech rights through that envelope.

The same point distinguishes *United States Postal Service v. Council of Greenburgh Civil Associations,* 453 U.S. 114 (1981). There is a fundamental difference between the government's uniform denial of access in *Greenburgh* and Cal. PUC's forced access for the very purpose of sponsoring a specific speaker. Denying access to mailboxes to everyone who has not purchased postage is completely independent of content and could not influence content in any manner.

It cannot be disputed that the speech of the utilities is chilled substantially by the penalty of governmentally mandated access to their billing envelopes. Whereas utilities were formerly free to speak to their customers through the billing envelope without concern that their statements would be immediately attacked through the same medium, they now must speak with the knowledge that their own envelopes may be used to contradict what they say. Allowing professional intervenors to make accusations against utilities in the utilities' *own envelopes* creates special burdens on the utilities' speech that use of a different medium would not create.

Accusations of excessive rates, for instance, made in a utility's own envelopes, are unquestionably made in the presence of the utility. Thus, utilities must respond or suffer the clear implication that the accusations are true.[18]

CONCLUSION

This Court should reverse the judgment of the California Supreme Court affirming Cal. PUC's Decision No. 83-12-047.

Respectfully submitted,

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18 "The theory underlying [adoptive] admission [by silence] is that the normal human reaction would be to deny [a statement damaging to a person made in his presence] if untrue." 4 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 801(d)(2)(B)[01], at 801-201 (1984).